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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 832.

STATE OF OKLAHOMA EX REL. LEON C. PHILLIPS, GOVERNOR OF
THE STATE OF OKLAHOMA, *Appellant*,

v.

GUY F. ATKINSON COMPANY, a Corporation Under the Laws
of the State of Nevada, CLEON A. SUMMERS, United
States District Attorney for the Eastern District of
Oklahoma, and CURTIS P. HARRIS, Special Attorney,
Department of Justice of the United States, *Appellees*.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF OKLAHOMA.

REPLY BRIEF FOR APPELLANT.

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GUY F. ATKINSON COMPANY, CLEON A. SUMMERS, UNITED
STATES ATTORNEY FOR THE EASTERN DISTRICT OF OKLA-
HOMA, ET AL., *Appellees*.

REPLY BRIEF FOR APPELLANT.

The Appellant and Appellees are, as shown by the briefs, far apart in their contentions as to the factual bases around which the constitutional questions must be resolved.

I.

General Statements in Reply

Prior Litigation.

Counsel for Appellees refer in their brief to the case of *Oklahoma v. Woodring*, 309 U. S. 623, wherein Appellant filed with this Court a motion for leave to file a Bill of Complaint asking for an injunction against Harry H.

Woodring, then Secretary of War. The statement is made that the complaint in the case at bar, except for the parties, "is substantially identical with the complaint in the *Woodring* case."

In this, counsel have fallen into a serious error.

The allegations of fact contained in paragraph 6 of the complaint (pages 6, 7, and 8 R.), to which we will presently refer, were referred to only incidentally in the complaint which the Appellant sought to file in the *Woodring* case. While counsel in the *Woodring* case, both for movant and respondent, dwelt at some length on certain facts, the then offered complaint did not contain the positive allegations to which we will presently refer*.

Paragraph 6 of the presently challenged complaint (pages 6, 7, and 8 of R.), after setting forth the statutory scheme for the dam and the reservoir, says:

"That as set forth in the statutory scheme or authorization act for said project, the first 110 feet in height of the dam [*i. e.*, the dead storage] is to be used solely and exclusively for the development of water power, and the superimposed 40 feet set forth in said statutory scheme is to be used solely and exclusively for the impounding and discharge of flood waters; that the statutory purposes for said project are not related to each other except by the fortuitous circumstance of being at the same location and being purportedly authorized by the same Act.

"That as set forth in the statutory scheme or authorization Act, the two purposes for which said reservoir and dam are authorized are functionally separate and neither is the incidental or necessary result of the other; that the water power feature of said project is not in aid of or related to the flood control feature thereof.

*Furthermore, since the submission of the *Woodring* case, an extensive oil field has been developed in the proposed basin, thereby greatly increasing the injuries which Appellant would suffer (page 4, R.).

except as hereinabove set forth; that the flood control reservoir as projected in said scheme cannot and will not affect the power feature thereof; that the flood control portion of said reservoir can only be used for the impounding and release of flood waters of Red River and Washita River. As set forth in the statutory scheme, the power reservoir will normally be kept full of water. It is no part of said statutory scheme or authorization Act, nor is it physically possible that the same part of the reservoir be used for both flood control and water power purposes; that as set forth in the statutory scheme or authorization Act, the waterpower portion of said reservoir is purposefully and separately created at the expense of the utilization for flood control of that part of the reservoir to be used for water-power."

In the brief of Appellees, these plain and positive allegations of fact are sought to be destroyed by mere assumptions. We will presently refer to the fallacy of these assumptions, but at this point we must emphasize that the only question here is whether the complaint states a cause of action.

It is well established that a mere general allegation that a legislative act is repugnant to the constitution is not enough. But it is likewise true that, "it is inexpedient to determine grave constitutional questions upon a demurrer to the complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."* *Borden's Farm Products Company v. Baldwin*, 293 U. S. 194, 213. This same case holds that the Court should read the complaint, "in the light of facts of which we may take judicial notice, but if, so read, it may be regarded as sufficient, the decision * * * should not turn on other facts which are the proper subjects of evidence and of determination of fact by the trial court" (page 209).

*Unless stated to the contrary, emphasis herein is supplied.

In the case of *Hammond v. Schappi Bus Lines*, 275 U. S. 164, 170-172, this Court used the following apposite language on this point and said:

"Before any of the questions suggested, which are both novel and of far reaching importance are passed upon by this Court, the facts essential to their decision should be definitely found by the lower court upon adequate evidence."

See also *Lindsley v. Natural Carbonic Gas Company*, 220 U. S. 61, 78-80; *Mayo v. Lakeland, Highlands Canning Company*, 309 U. S. 310, 318.

The court below seems to have fallen into the same error as have counsel for Appellees, and disregarded the plain and positive allegations of fact set forth in the complaint as is illustrated in this language from the memorandum opinion from the court below:

"While it may be true that the generation of electricity is not incidental to flood control, it manifestly is true that when the Government impounds water behind a dam for purposes of flood control, there is a vast amount of stored energy which may reasonably be converted into electrical energy."

The complaint alleges squarely to the contrary, viz.; that a dam constructed for flood control would create no amount of raw water power, much less "a vast amount." The complaint also negatives the assumption of counsel for Appellees that the power of falling water is a mere incident of the construction of a flood control dam.

Appellees' statements pages 13, 14, and 15 of their brief, that the dead storage part of the Denison Reservoir is for the "accumulation of silt" and that the allegations in Appellant's complaint; that the dead storage-part of the reservoir is solely for the development of water power, are misleading and incorrect, constitute only another effort to overcome by assumptions a positive allegation of fact.

Indeed, this serves to emphasize how important it is that, when this Court comes to pass upon the important constitu-

tional questions here involved, it shall do so only on the basis of complete facts, determined by orderly processes in the trial court.

The definite allegation is made in the complaint that "dead storage is to be constructed solely in order to give a head for water power." (Page 6 R.).

This is precisely what the statutory scheme provides (H. D. 541, page 6).

On page 41 (H. D. 541), the District Engineer says:

"*** the remainder of 1,400,000 acre feet would be dead storage used primarily for creation of head."

"Dead storage" cannot be of the slightest benefit for flood control or "improving navigation" or "regulating the flow of Red River" as we have pointed out in our original brief (pages 45, 46). The flood control reservoir would require no dead storage at all. In fact dead storage can afford no flood control whatsoever and the complaint so alleges. The flood control reservoir would come into temporary use only during flood times and then for the temporary impounding and releasing of flood waters.

What we have just said is in answer to the contention of Appellees to the effect that the court below, or this Court, should, in view of the grave constitutional questions presented, adjudge the complaint insufficient upon its face without hearing the evidence.

II.

The Denison Reservoir Project Cannot Be Sustained as a Valid Exercise of the Commerce Power of Congress. (Pages 31-44, Brief for Appellees.)

As pointed out in our orginal brief (pages 41-44 and pages 50-53), this project has no substantial relation to the improvement of navigation or to interstate commerce.

The amendment to the complaint (p. 18, R.) specifically alleges:

"That the sole and only purposes of said project are those set forth in the Authorization Act and described

in the statutory scheme aforesaid for flood control and hydroelectric power, neither of which has any real or substantial relation to the improvement of navigation of the navigable portions of Red river or of the Mississippi river; such inconsequential and intangible benefits to navigation as may result from said project, would flow from the flood control feature thereof and not the hydroelectric feature thereof."

Appellees in their Brief use a hypothetical flood (some two and a half to three times greater than the largest known flood of record, that of 1908), set forth in Appendix H to House Document 541, as the basis of saying that the flood control feature of the Denison project would prevent serious interruption to the arteries of interstate commerce.

At p. 11 of their Brief, Appellees refer to a so-called "Definite Project," and attach as Appendix C (pp. 97-110) certain portions thereof and on April 30th Appellant received from counsel for Appellees a mimeographed copy of an undated report purportedly made by the District Engineer, which on its face has not been approved by *any* higher authority, let alone by the Chief of Engineers and the Secretary of War, and which obviously has no status as a public document. The resort by Appellees to such an expedient serves only to emphasize the vice of seeking to persuade this Court to decide these important constitutional issues without the benefit of an orderly determination of the *factual* issues.

Counsel for Appellant have not had opportunity to digest the contents of that report, either by themselves or with the benefit of technical advice. However, mere scanning of the report has revealed some pertinent things.

For instance, in the "Definite Project" all means to provide flood control protection for the above-mentioned and so-called *hypothetical* flood (per Appendix H, H. D. 541) is abandoned. The "Definite Project" provides (bottom of page 100, Appellees' Brief):

"Accordingly, storage to control floods equal in magnitude to the 1908 flood, the largest on record, is all that can be economically justified."

It would thus seem clear that, in so far as the separate flood control feature of the project is concerned, the same is now limited to economic advantages to agriculture in the valley below the dam, since it is clearly shown by the statutory scheme that:

"In general, there are but few of the works of man such as cities, villages, highway or railway bridges, or even farm buildings in the ordinary flood plain of the river" (page 29)*

While it is true, as set forth in our original brief, that floods of the intensity of the one in 1908 do cause serious agricultural damage, there is no basis in the findings of the engineers that arteries of the interstate commerce are seriously interrupted.

In saying the above we make no argument against the plenary power of Congress to regulate interstate commerce, but we do earnestly contend that in so far as interstate commerce or navigation is concerned the project has no substantial or tangible relation thereto. In fact, as our scanning has disclosed, even the report on the "Definite Project" specifically provides (page 3, Volume I):

"4. Purpose of Project.—The project is for the *control of floods* in the Red River Valley below Denison, Texas, and for the *production of hydroelectric power.*"

On page 26 the statement is made:

"74. Reservoir Operation.—The operation of the Denison project involves consideration of its two-fold purposes; i. e., *flood control and power.*"

*As pointed out in our brief (page 42), the flood control feature would protect only agricultural land east or below the dam and only to the extent of floods which arise on Red River west or above the dam. Appellees' Brief (page 41) refers to the washing out of a toll bridge in Wichita County, Texas, and another bridge in Burk Burnett, Texas. These locations are far to the west and above the dam and could not possibly be benefitted by it. The flood at Shreveport, Louisiana, referred to on page 14 of Appellees' Brief, was caused by the flood waters which originated on tributaries of Red River east or below the dam. All the above adds emphasis to our contention that the final decision in this case should be based on findings of fact by the trial court.

There appears to be no claim of benefit to navigation or interstate commerce.

The statement on page 36 of Appellees' Brief, to the effect that it is an engineering fact that part of the project "necessary for flood control is also available for power," is directly contradicted by the positive allegations of the complaint and the factual data supplied by the statutory scheme (p. 30, 31, 35-39 Appellant's Original Brief).*

Following the argument of Appellees to its logical conclusion, the interstate commerce power would be swelled to a point where it would absorb all the powers of Appellant, destroy our Federal Constitutional system and result in a completely centralized Government.

Even assuming that the flood control feature could be said to rest upon constitutional power, it could not be logically contended that Congress, having such power, might in addition construct a waterpower project having no functional or rational relation to the flood control feature. If Congress under the facts alleged in the complaint, may construct the waterpower feature of the Denison project, it could logically go further and construct facilities for the processing of agricultural products, such as cotton gins, milling companies, feed mills, etc.

The challenged complaint by its allegations brings the authorization of the Denison project under the condemnation of the constitutional principle that the attainment of a prohibited end may not be accomplished under the pretext of exercising granted powers (*Linder v. U. S.*, 268 U. S. 5, 17, and authorities cited on page 60 of Appellant's Original Brief).

We close this division of our reply argument by emphasizing the statement of Counsel for Appellees on page 20 of their brief that,

*On page 2, Appendix F, Volume I, "Definite Project," the statement is made: "The elevation of the top power pool is based on the energy generation and the capacity of the power plant required to meet the market demand reported by the Federal Power Commission." In short, the power project and purpose predominate.

"Judicial review is we believe limited to determining whether or not the legislation is *in fact* a regulation of interstate commerce"

The above statement is precisely what we contend for in this case. We were denied a hearing in the court below on the question that the legislation with respect to the Denison project bears no direct relation to the regulation of interstate commerce.

III.

Project Cannot Be Sustained as a Proper Exercise of the Power of Congress to Provide for the General Welfare.

(Pages 44-60, Brief for Appellees.)

In our original brief (pages 54-55), we have cited the applicable authorities construing the general welfare cause. Appellees have devoted much space in their brief to the long continued policy of Congress to make appropriations of money under the general welfare cause. It is asserted that flood control is a national problem and that flood disasters have long been the cause of study by Congress as well as the Army Engineers.

We believe that the beneficent purposes of Congress with respect to flood control and other national problems have but little, if any, relevancy to the questions before the Court on this appeal. We do not have here any question involving the authority of Congress to levy taxes or spend money for the promotion of the general welfare. It is our position that the power to spend for the general welfare is not a substantive grant of authority to the Federal Government outside the compass of granted or implied powers to undertake directly, much less to engage in undertakings not related to any of its constitutional powers, merely because they involve the expenditure of money.

Counsel for Appellees contend, in substance, that Congress having the power to authorize a flood control project may add thereto an entirely separate and unrelated one for the development of water power as a means of making the

project economically feasible. This is the theory upon which the engineers projected the statutory scheme and is the theory upon which Congress authorized the project.

It is our belief that this Court need not reach the question of the constitutional authority of the Government to authorize a flood control project. Assuming arguendo that the Government does have such power, the question here is whether it may separately and purposefully construct a power project merely because it is constructing a flood control project at the Denison site. What we here assert is not that the Government is spending money, but that Appellees are condemning lands within Appellant's domain for a reservoir site and the contractor having control over a large number of people with a large number of machines is engaged in erecting a physical structure, which when completed, will embrace two entirely unrelated projects resulting in the forcible destruction of a large acreage of Appellant's domain including its own fast lands and that of its citizens with the attending consequences set forth in the complaint.

We assert that Congress has no authority under the general welfare or any other power to authorize Appellees to commit the physical acts for the accomplishment of the purposes set forth in the complaint.

Appellees assert that Congress having the power to levy taxes and spend money must also have the necessary and proper means by which it can spend, including the power of eminent domain and the power to take and destroy Appellant's quasi sovereign, proprietary and boundary rights. Following that argument to its logical end, it is asserted that Congress having the power to spend money may go further and authorize any project provided the same relates to the national welfare, and "that this welfare is general, not particular" (pages 55, 56; Appellees' Brief).

It is also asserted, in substance, that the exercise of the Federal welfare power is, of all the powers of Congress, least adapted to judicial inquiry. Probably proceeding on this theory, counsel argue that the Denison project would

afford "relief for the unemployed," provide a "considerable stimulus" to the industrial development of the area; make possible the enlarged cultivation of the wooded sections of the south area in the basin;* benefit the control of malaria; afford recreational facilities, etc.

It would serve no useful purpose to attempt any extended reply to this line of argument. In the first place, it is irrelevant to the issues of fact presented by the complaint. In the next place this Court is definitely committed to the doctrine that the general welfare clause may not be used by Congress, "to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restriction save such as are self-imposed." *United States v. Butler*, 297 U. S. 1, 78, and the authorities cited on page 44 of Appellant's Original Brief.

CONCLUSION.

I. The complaint alleges that the statutory scheme involved purports to authorize two entirely separate and distinct projects at the same site, viz, a power project and a flood control project.

(a) The power project occupies the entire site up to elevation 620 feet (617 feet as the plans have been modified), and precludes the use of any part of the site up to that elevation for flood control purposes.

(b) The flood control project is superimposed upon the power project, and occupies that part of the site above elevation 620 feet in the statutory scheme (above elevation 617 feet as the plans have been modified). See General Schley's statement page 24 of the original brief.

(c) We have here a dual or multiple purpose *statutory scheme* for two separate and entirely unrelated purposes. The situation is precisely the same as would exist if Congress had initially authorized the construction solely of a power project occupying the site up to elevation 620 feet in

*Directly in conflict with the Government's policy for the prevention of surplus crops.

a statute dealing with no other project or subject matter. Congress, at a later date, might by a second and independent act have authorized the construction of a flood control reservoir superimposed upon the power project. Plainly, the validity or the constitutional authority to construct each of these projects would have to be separately determined and that necessity cannot be escaped by authorizing both projects concurrently in a single statutory scheme.

II. The questions presented then are:

- (a) Has the Federal Government constitutional authority to authorize the separate power project?
- (b) If we assume the Federal Government has constitutional authority to authorize the separate flood control project, the two projects are so inseparable as to render the whole scheme invalid*
- (c) Even if the authorization for the Denison project were severable, Appellant would be entitled to enjoin the unconstitutional construction of the separate power project, and entitled to the great relief which would be offered it to that extent. (See pp. 44-46 Appellant's original Brief.) On the basis of a flood control project in the Statutory Scheme requiring 5,900,000 acre feet, the land required for a flood control project alone would be 25 per cent less. Under the modified plans the acre feet required for flood control is reduced to 2,745,000 acre feet (see p. 33, original Brief), which would save Appellant the loss of 3,080,000 acre feet required for power (dead storage 1,020,000 acre feet. Power pool, 2,060,000 acre feet).

*It is plain that the two projects are inseparable because Congress would not have authorized the flood control project except for the profits anticipated from the power project and because under the statutory scheme it would be physically impossible to construct the flood control project without the prior construction of the power project since the flood control feature is superimposed on the power reservoir.

III. While the court need not reach the question of the constitutional power of Congress to construct the flood control project under the circumstances in this case, the lack of constitutional authority to construct the separate power project is inescapable under the settled decisions of this court.

(a) There is a marked distinction between the creation of raw water power and its conversion into electrical energy. The raw water power must first be constitutionally created and it may be so created only where it comes into being as the incidental and necessary result of the operation and construction of a constitutional structure.

In this case the raw water power is not constitutionally created, but is separately and purposefully created by the unconstitutional construction of an entirely independent project occupying the site up to elevation 620 feet, or 617 feet as the plans have been modified.

The decisions of this court uphold the right of the Government to convert constitutionally created waterpower into electricity. We have no such facts in the case at bar, for here the raw waterpower is not incidentally created and has no relation to the flood control project.

(b) The raw waterpower and the power project are here separately and purposefully created, not as an incident of the construction of the flood control project, but at the expense of the utilization of the site for a flood control project.

(c) There is no conceivable relation between the water-power feature of the project and navigation or flood control. On the other hand, the relation of dead and power storage to the production of power is direct and practically total.

IV. We are not here dealing with motive; but with purposes of Congress. Motive is the thing which moves Congress to act, but a purpose is the objective sought to be achieved.

The purpose of Congress to construct a separate and independent power project is inescapable and that purpose, or objective, is in excess of constitutional authority. The inescapable nature of the statutory scheme cannot be obscured by any congressional declarations. (See authorities, page 60 Appellant's Brief)

The Congressional declaration with respect to the Denison Reservoir of "other beneficial uses" is shown by the complaint to comprehend the purpose to construct a separate power project.

V. While this project is referred to in the statutory scheme and in the briefs as one for dual or multiple purposes, it must be remembered that, as shown by the complaint as well as the engineer's report, *the only duality of purpose is in the statutory scheme.* The complaint shows that the two purposes are entirely separate and the power feature is not the incidental result of the construction and operation of the flood control feature.

Respectfully submitted,

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